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No. 14-9496

IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

MATTHEW S. HELLMAN
ERICA L. ROSS
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

MICHAEL A. SCODRO
Counsel of Record
CLIFFORD W. BERLOW
BRIANA T. SPRICK-SCHUSTER
CHRISTOPHER M. SHEEHAN
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
mscodro@jenner.com

MARTIN J. SHANAHAN, JR.
CORPORATION COUNSEL
CITY OF JOLIET
150 West Jefferson Street
Joliet, IL 60432
(815) 724-3800

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Legal Background 3

B. Factual Background 10

C. Procedural History 12

SUMMARY OF THE ARGUMENT 16

ARGUMENT 17

I Any Fourth Amendment Claim Petitioner Had Is Time-Barred, And He Cannot Overcome That Bar By Labeling His Claim "Malicious Prosecution" 17

A. Petitioner Cannot Rely On The Elements Of Common-Law Malicious Prosecution To Delay Accrual Of A Fourth Amendment Claim 19

1. Malicious Prosecution's Favorable-Termination Element Does Not Apply To Petitioner's Fourth Amendment Claim 20

2. Fourth Amendment Principles Are Impossible To Square With Other Elements Of Common-Law Malicious Prosecution 25

B. Petitioner Has Not Relied And Cannot Rely On A Continuing-Violation Theory 29

C. Without A Favorable-Termination Element Or Continuing Violation, Petitioner's Claim Fails 33

II. After The Prosecution Begins, The Due Process Clause, Not The Fourth Amendment, Governs Petitioner's Claim That His Detention Was Unduly Prolonged 35

A. There Is No Fourth Amendment Claim For Unduly Prolonged Detention Following Arrest And Commencement Of Prosecution 36

B. The Due Process Clause Is The Sole Constitutional Home, If One Exists, For Petitioner's Claim 40

C. The Court Need Not Determine When Petitioner Was First Held Pursuant To The Ongoing Prosecution, But His Initial Appearance Before A Magistrate Is Consistent With Nationwide Criminal Procedure And This Court's Precedent 46

D. Petitioner's Counterarguments Fail 49

E. There Are Advantages To Favoring State Law As A Source Of Malicious Prosecution Claims 53

CONCLUSION 55

TABLE OF AUTHORITIES

Page(s)

CASES

Albright v. Oliver, 510 U.S. 266 (1994) ..... *passim*

Arizona v. Fulminante, 499 U.S. 279 (1991) 45

Arizona v. Youngblood, 488 U.S. 51 (1988) 42

Ashcroft v. Al-Kidd, 563 U.S. 731 (2011) 26

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 10

Awabdy v. City of Adelanto, 368 F.3d 1062 (9th Cir. 2004) 8

Baker v. McCollan, 443 U.S. 137 (1979). 37, 38, 39, 41

Batiste v. City of Boston, 23 F.3d 394, 1994 WL 164568 (1st Cir. 1994) 31

Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007)... 31, 32

Bell v. Wolfish, 441 U.S. 520 (1979) 31, 37, 39, 43

Board of Regents of University of New York v. Tomanio, 446 U.S. 478 (1980) 32

Brady v. Maryland, 373 U.S. 83 (1963) 40

Bruington v. Wingate, 7 N.W. 478 (Iowa 1880) 26

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) 4, 8

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 42

Bump v. Betts, 19 Wend. 421 (N.Y. Sup. Ct. 1838) 49

Burns v. Reed, 500 U.S. 478 (1991) 51

California v. Hodari D., 499 U.S. 621 (1991) 30

California v. Trombetta, 467 U.S. 479 (1984) 45

Campbell v. Brummett, 504 U.S. 965 (1992) 4, 5

Coleman v. Alabama, 399 U.S. 1 (1970) 49

Cordova v. City of Albuquerque, 816 F.3d 645 (10th Cir. 2016) 9, 21, 54

Costello v. United States, 350 U.S. 359 (1956) 38

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 50

Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001) 31

Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981) 5

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016) 29

Daniels v. Williams, 474 U.S. 327 (1986) 4, 7, 45

Delaware State College v. Ricks, 449 U.S. 250 (1980) 29, 31

Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) 42

Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851) 3

Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982) 5

Fortman v. Rottier, 8 Ohio St. 548 (1858) 49

Franks v. Delaware, 438 U.S. 154 (1978) 27

Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998) 5

Gerstein v. Pugh, 420 U.S. 103 (1975) ..... *passim*

Glenn v. Lawrence, 117 N.E. 757 (Ill. 1917) 26

Glover v. City of Wilmington, 966 F. Supp. 2d 417 (D. Del. 2013) 54

Graham v. Connor, 490 U.S. 386 (1989) 26, 27, 38

Grider v. City of Auburn, 618 F.3d 1240 (11th Cir. 2010) 8

Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990) 5

Haring v. Prosise, 462 U.S. 306 (1983) 21, 24

Hartman v. Moore, 547 U.S. 250 (2006) 4, 38

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 31

Heck v. Humphrey, 512 U.S. 477 (1994) 7, 22, 23

Hernandez-Cuevas v. Taylor, 723 F.3d 91 (1st Cir. 2013) 8

Hudson v. Palmer, 468 U.S. 517 (1984) 45

Julian v. Hanna, 732 F.3d 842 (7th Cir. 2013) ... 53, 54

Kaley v. United States, 134 S. Ct. 1090 (2014) ... 43, 44

Kalina v. Fletcher, 522 U.S. 118 (1997) 4, 51

Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621 (9th Cir. 1988) 5

Kentucky v. King, 563 U.S. 452 (2011) 26

Kerr v. Lyford, 171 F.3d 330 (5th Cir. 1999) 9

Kingsland v. City of Miami, 382 F.3d 1220 (11th Cir. 2004) 8

Klen v. City of Loveland, 661 F.3d 498 (10th Cir. 2011) 42

Kossler v. Crisanti, 564 F.3d 181 (3d Cir. 2009) 8

Llovet v. City of Chicago, 761 F.3d 759 (7th Cir. 2014) 9, 39, 48

MacNamara v. Hess, 67 F. App'x 139 (3d Cir. 2003) 31

Mahoney v. Kesery, 976 F.2d 1054 (7th Cir. 1992) 5

Malley v. Briggs, 475 U.S. 335 (1986) 34

McCune v. City of Grand Rapids, 842 F.2d 903 (6th Cir. 1988) 31

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 4

Michigan v. Doran, 439 U.S. 282 (1978) 36

Miles v. Paul Mook of Ridgeland, Inc., 113 So. 3d 580 (Miss. Ct. App. 2012) 54

Minneapolis Threshing-Machine Co. v. Regier, 70 N.W. 934 (Neb. 1897) 28

Mondragon v. Thompson, 519 F.3d 1078 (10th Cir. 2008) 9

Mooney v. Holohan, 294 U.S. 103 (1935) 41-42

Morales v. Ramirez, 906 F.2d 784 (1st Cir. 1990) 5

Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997) 8

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 31

Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001) 9, 14, 15, 51

North Carolina v. Pearce, 395 U.S. 711 (1969) 42

Owens v. Baltimore City State's Attorney's Office, 767 F.3d 379 (4th Cir. 2014) 8

Parratt v. Taylor, 451 U.S. 527 (1981) 7, 53

Paul v. Davis, 424 U.S. 693 (1976) 45

Perry v. Sindermann, 408 U.S. 593 (1972) 41

Rehberg v. Paulk, 132 S. Ct. 1497 (2012) ... 4, 17, 44, 49

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997) ... 31-32

Rothgery v. Gillespie County, 554 U.S. 191 (2008) 47

Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) 5

Savile v. Roberts, 91 Eng. Rep. 1147 (K.B. 1698) 46

Scott v. United States, 436 U.S. 128 (1978) 26, 27-28

Sherburne v. Rodman, 8 N.W. 414 (Wis. 1881) 26

Stancliff v. Palmeter, 18 Ind. 321 (1862) 28

Steward v. Gromett, 141 Eng. Rep. 788 (Ct. Common Pleas 1859) 49

Surprenant v. Rivas, 424 F.3d 5 (1st Cir. 2005) 42

Thomas v. Kippermann, 846 F.2d 1009 (5th Cir. 1988) 5

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 30, 37

United States v. Augenblick, 393 U.S. 348 (1969) 40

United States v. Bagley, 473 U.S. 667 (1985) 40

United States v. Calderon, 348 U.S. 160 (1954)..... 27

United States v. Goodwin, 457 U.S. 368 (1982) ..40, 42

United States v. Leon, 468 U.S. 897 (1984)... 20, 24, 30

United States v. Salerno, 481 U.S. 739 (1987)....41, 43

Vasquez v. Hillery, 474 U.S. 254 (1986) 33

Wallace v. Kato, 549 U.S. 384 (2007)..... *passim*

Whitlock v. Brueggemann, 682 F.3d 567 (7th Cir. 2012) 42

Wilkins v. DeReyes, 528 F.3d 790 (10th Cir. 2008)..... 8

Wolff v. McDonnell, 418 U.S. 539 (1974)..... 41

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) 42

Zinermon v. Burch, 494 U.S. 113 (1990)..... 53

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. IV..... 20

U.S. Const. amend. XIV 36

42 U.S.C. §1983.....2, 12, 14, 21, 33, 44

720 ILCS §5/109-1(a) 11

720 ILCS §5/109-1(b)(1)..... 11

720 ILCS §5/109-1(b)(2)..... 11

720 ILCS §5/109-1(b)(4)..... 11

720 ILCS §5/109-3.1(b) 11

720 ILCS §570/402(c)..... 10

OTHER AUTHORITIES

32 Am. Jur. 2d *False Imprisonment* (2007) 28

3 William Blackstone, Commentaries 45

William J. Cuddihy, *The Fourth Amendment: Origins & Original Meaning* (2009) 21

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 21

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Fed. R. Crim. P. 5(a) 47

Fowler V. Harper, *Malicious Prosecution, False Imprisonment & Defamation*, 15 Tex. L. Rev. 157 (1937) 3

https://ipublic.il12th.org/SearchPrompt.php 11

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W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 4

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Unif. R. Crim. P. 311(a) (1987)..... 47

Unif. R. Crim. P. 311(d) (1987)..... 47

INTRODUCTION

This case does not ask the Court to decide whether police misstatements to obtain an arrest warrant, or to ratify a warrantless arrest at a *Gerstein* hearing, are constitutional violations, or even whether they are *Fourth Amendment* violations. The Seventh Circuit's decision below does not hold otherwise. It treats such violations as part and parcel of an unlawful arrest, a claim that is time-barred here because petitioner waited more than two years to file his complaint.

Instead, this case is about whether, as petitioner frames the question, he can assert "a *malicious prosecution* claim based upon the Fourth Amendment." Pet. i (emphasis added). Petitioner presents the question that way because his Fourth Amendment claim is timely only if it includes an element of *common-law* malicious prosecution—the so-called "favorable termination" element, which delays accrual of malicious prosecution claims by requiring plaintiffs to prevail first in the underlying "prosecution." If petitioner's Fourth Amendment challenge is not a "malicious prosecution" claim, as he has defined that term from the start of this litigation, then his claim fails (and the answer to the question presented is "no"), regardless of which proceedings are governed by the Fourth Amendment.

The petition for certiorari insisted that this case is of "national importance" because it asks the Court to decide whether claims like petitioner's receive the benefit of the common law's delayed-accrual rule, as courts on petitioner's side of the split have held in recognizing a Fourth Amendment claim with the "malicious prosecution" moniker. Pet. 19–21. This case

is an "ideal vehicle" for reconciling the circuit split, the petition continued, because, "if Manuel is to have an opportunity to be compensated for his injuries," he needs "[a] malicious prosecution claim," which "does not accrue, * * * until the criminal charges giving rise to the claim terminate in favor of the plaintiff." Pet. 25. Indeed, petitioner indicated, the "fate" of his Fourth Amendment challenge turns on whether he has the benefit of this common-law favorable-termination element. Pet. 21.

Yet petitioner's opening brief fails to discuss the elements of the Fourth Amendment malicious prosecution claim he asks the Court to recognize, including the favorable-termination element he needs to prevail. Petitioner focuses instead on whether alleged lies in support of a *Gerstein* finding are actionable under the Fourth Amendment—an argument the Seventh Circuit never rejected, and one that gets petitioner nowhere. Again, as the question presented reflects, petitioner needs not just any Fourth Amendment claim, but rather a Fourth Amendment *malicious prosecution* claim, complete with that tort's unique delayed-accrual rule.

It is not hard to understand why petitioner's opening brief fails even to define the elements of the malicious prosecution tort he asks the Court to adopt: The common-law elements petitioner seeks have no place in a §1983 Fourth Amendment claim. Most importantly, it makes no sense to condition relief for an unlawful *seizure* on whether the arrestee ultimately prevails on the merits *before or during trial.* The Fourth Amendment protects the guilty and innocent alike, and a person arrested without probable cause should not lack a Fourth Amendment remedy

because—while awaiting trial—the state gathers sufficient evidence to lawfully convict him.

Without a timely Fourth Amendment claim arising from his arrest and initial probable cause finding, petitioner could challenge his ongoing pretrial detention only by challenging the *prosecution* that caused it. But the Fourth Amendment does not govern prosecutions. Accordingly, once the initial seizure and probable cause finding are off the table (as they are here because of the time bar), petitioner must look to due process, not the Fourth Amendment, to vindicate the claim that his detention was unduly "prolonged." Pet'r Br. 13. Otherwise, challenges to grand jury proceedings, preliminary hearings, and trials all would become Fourth Amendment claims, provided only that the plaintiff alleged that these proceedings resulted in longer detention—including post-conviction incarceration—without probable cause.

STATEMENT

A. Legal Background

1. Malicious prosecution is a common-law tort with defined elements. It has long supplied a remedy for violations of one's "interest in freedom from unjustifiable litigation * * * ." Fowler V. Harper, *Malicious Prosecution, False Imprisonment & Defamation*, 15 Tex. L. Rev. 157, 159 (1937); see *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851). And it has balanced that private interest with the broader "social interest supporting resort to law" by requiring plaintiffs to prove a demanding slate of elements: "1. A criminal proceeding instituted or continued by the defendant against the plaintiff[;] 2. Termination of the proceeding in favor of the accused[;]

3. Absence of probable cause for the proceeding[;] [and] 4. 'Malice,' or a primary purpose other than that of bringing an offender to justice." W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* §119 at 871 (5th ed. 1984); see also *Restatement (Second) of Torts* §653 (1977).

2. "42 U.S.C. §1983 creates 'a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) (quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (internal quotation marks omitted)). But "[n]ot every common law tort committed by state or local government officials is actionable under §1983." *Brummett v. Camble*, 946 F.2d 1178, 1183 (5th Cir. 1991); see also *Daniels v. Williams*, 474 U.S. 327, 332 (1986); 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* §3.63 (4th ed. 2015). So while courts consider the common law when "identifying * * * the elements of the cause of action" for constitutional claims cognizable under §1983, *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997), "the Court's precedents have not mechanically duplicated" the common law. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012); see *Hartman v. Moore*, 547 U.S. 250, 258 (2006) ("[T]he common law is best understood * * * as a source of inspired examples than of prefabricated components of [constitutional] torts.").

3. For many years, the Court had not addressed "the availability and contours of a §1983 malicious prosecution claim," including "when the cause of action accrues." *Campbell v. Brummett*, 504 U.S. 965, 966 (1992) (White, J., dissenting from denial of certiorari).

Most courts of appeals had held that malicious prosecution was cognizable as a §1983 tort only if the tort's common-law elements were met *and* "the defendants' conduct also infringe[d] some [other] provision of the Constitution or federal law." *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990).[1] Courts also split over the constitutional basis for a §1983 malicious prosecution claim, with the majority viewing it as a due process tort, *e.g.*, *Gallo v. City of Phila.*, 161 F.3d 217, 221 (3d Cir. 1998), and a minority concluding that it also could implicate Fourth Amendment interests, see *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988). There was "considerable confusion in the Courts of Appeals." *Campbell*, 504 U.S. at 966 (White, J., dissenting from denial of certiorari).

The plaintiff in *Albright v. Oliver* brought a §1983 claim alleging that an officer had procured an arrest warrant without evidence sufficient to establish probable cause. 510 U.S. 266, 268 (1994). He claimed that, because the warrant caused his arrest, the officer's actions "deprived him of substantive due process under the Fourteenth Amendment—his 'liberty interest'—to be free from criminal prosecution except upon probable cause." *Id.* at 269.

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[1] Accord *Mahoney v. Kesery*, 976 F.2d 1054, 1059–60 (7th Cir. 1992); *Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988); *Dunn v. Tenn.*, 697 F.2d 121, 125–26 (6th Cir. 1982); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); *Sami v. United States*, 617 F.2d 755, 773–74 (D.C. Cir. 1979), *abrogated by Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The Court rejected Albright's substantive due process theory, but for different reasons borne of different understandings of his claim. A four-Justice plurality concluded that his claim failed because, in substance, he challenged the reasonableness of his arrest, which "constituted a seizure," making it "the Fourth Amendment, and not substantive due process, under which [plaintiff's] claim must be judged." *Id.* But because petitioner had not included a Fourth Amendment challenge in his petition for certiorari, the Court "express[ed] no view as to whether petitioner's claim would succeed under the Fourth Amendment." *Id.* at 275; see *id.* (Scalia, J., concurring) ("[H]ere * * * the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest.").

The plurality considered the claim as one based on Albright's arrest, rather than his prosecution, *id.* at 274, and therefore did not discuss the contours of a §1983 malicious prosecution claim. In fact, the plurality touched on malicious prosecution only in a footnote reporting that "the extent to which a claim of malicious prosecution is actionable under §1983 is one 'on which there is an embarrassing diversity of judicial opinion'" and that "[i]n view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a 'tort.'" *Id.* at 270 n.4 (citation omitted).

Concurring in the judgment, Justice Kennedy, joined by Justice Thomas, explained that while he agreed that "an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process[,] * * * [Albright's] due process claim concern[ed] *not* his arrest but instead the malicious

initiation of a baseless criminal prosecution against him." *Id.* at 281 (Kennedy, J., concurring in the judgment) (emphasis added). Because of that disagreement with the plurality over the crux of Albright's complaint, Justice Kennedy concluded that Albright could assert, at most, a §1983 procedural due process claim for malicious prosecution. Justice Kennedy further determined that any such claim—to the extent it was cognizable as a constitutional tort at all—would fail under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), because state law provided an adequate remedy, 510 U.S. at 283–84.

4. Six months later, the Court imported into certain §1983 claims a requirement it analogized to malicious prosecution's favorable-termination element. In *Heck v. Humphrey*, the Court held that "to recover damages for * * * actions whose unlawfulness would *render a conviction or sentence invalid*, a §1983 plaintiff must prove that the conviction or sentence has been reversed * * * ." 512 U.S. 477, 486–87 (1994) (emphasis added). Thus, "[j]ust as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor * * * so also a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489–90 (citations omitted). The Court later clarified that the *Heck* rule does *not* extend to Fourth Amendment claims for false arrest, which are concerned not with the outcome of a prosecution, but with the lawfulness of the initial seizure. *Wallace v. Kato*, 549 U.S. 384, 393 (2007). Indeed, *Wallace* called any extension of *Heck* to actions

that "would impugn *an anticipated future conviction*" both "bizarre" and "impractical[ ]." *Id.*

5. Following the Court's fractured decision in *Albright*, the courts of appeals remained splintered over §1983 malicious prosecution. Most construed *Albright* as grounding §1983 malicious prosecution in the Fourth Amendment, but then divided over how to square the tort with Fourth Amendment principles. For example, while all courts of appeals to consider the issue adopted a favorable-termination element as part of a Fourth Amendment malicious prosecution claim, many did so because it was an element at common law, *e.g.*, *Owens v. Balt. City State's Atty's Office*, 767 F.3d 379, 388–92 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1893 (2015);[2] others because of *Heck*, *e.g.*, *Kossler v. Crisanti*, 564 F.3d 181, 187 (3d Cir. 2009); and at least one on the theory that the favorable-termination element, like all other elements of §1983 malicious prosecution, applies so long as the relevant state-law malicious prosecution tort includes it, see *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997). Courts also divided over the common-law element of malice, with some holding that malicious prosecution does not require proof of malice, *e.g.*, *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100–01 (1st Cir. 2013), and others reading that common-law element into the Fourth Amendment claim, *e.g.*, *Grider v. City of Auburn*, 618 F.3d 1240, 1256 & n.24 (11th Cir. 2010).

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[2] Accord *Wilkins v. DeReyes*, 528 F.3d 790, 801 n.6 (10th Cir. 2008); *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066–68 (9th Cir. 2004); *Brummett*, 946 F.2d at 1183.

For its part, the Seventh Circuit recognizes a §1983 Fourth Amendment tort for unlawful seizure that accrues at the time of the initial seizure—whether at the moment of arrest or, at the latest, when the defendant is "arraign[ed]" or makes an "initial appearance in court." *Llovet v. City of Chi.*, 761 F.3d 759, 763 (7th Cir. 2014) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 1185 (2015). But the court declines to call this claim "malicious prosecution" or to read elements of the common-law tort—including the favorable-termination element—into it. So in the Seventh Circuit, "[r]elabeling a fourth amendment claim as 'malicious prosecution' [does] not extend the statute of limitations." *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

If the malicious initiation and maintenance of a prosecution itself violates the Constitution, then the Seventh Circuit holds that it violates procedural due process, not the Fourth Amendment. *Newsome*, 256 F.3d at 750–51; accord *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) (McConnell, J.); *Cordova v. City of Albuquerque*, 816 F.3d 645, 661–65 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment); *Kerr v. Lyford*, 171 F.3d 330, 342–43 (5th Cir. 1999) (Jones, J., specially concurring with Garza, J.), *abrogated by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). Embracing Justice Kennedy's concurrence in *Albright*, the Seventh Circuit further holds that under *Parratt*, there is no deprivation of procedural due process so long as the state provides an adequate remedy for malicious prosecution, as most states do. *Newsome*, 256 F.3d at 750–51.

B. Factual Background

1. On March 18, 2011, petitioner Elijah Manuel was a passenger in a car his brother was driving. First. Am. Compl. ¶¶20–22 (J.A. 62).[3] Respondent police officers for the City of Joliet pulled the vehicle over after observing it fail to signal a turn. J.A. 90. A patdown of petitioner revealed a bottle of pills, and the officers arrested petitioner for possession of ecstasy, a controlled substance. First Am. Compl. ¶¶21, 35, 38, 115 (J.A. 62, 63, 64, 69); J.A. 91–92.

Petitioner alleges that the bottle contained only vitamins, and that the officers knew this because both a field test at the scene, and a subsequent test at the police station, revealed that the pills did not contain a controlled substance. *Id.* ¶¶112–114, 121–122 (J.A. 69–70). The police reports nonetheless stated that the officers knew from their training and experience that the pills were ecstasy, and that an evidence technician's test confirmed that conclusion. J.A. 91–92.

2. Later that day, one of the respondent officers swore out a criminal complaint charging petitioner with unlawful possession of ecstasy in violation of the Illinois Controlled Substances Act, 720 ILCS 570/402(c). See J.A. 52–53.

3. As required by Illinois law, petitioner was brought before a court by videoconference for a

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[3] The district court granted respondents' motion to dismiss, and the Seventh Circuit affirmed that ruling. Accordingly, the factual allegations in petitioner's complaint (which respondents dispute) must be taken as true at this point in the proceedings. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"custody hearing" that same day, March 18, 2011.[4] See 725 ILCS §5/109-1(a). Petitioner waived the opportunity, at the hearing, to dispute that the officers' allegations satisfied probable cause for arrest. See *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975) (requiring judicial determination of probable cause following warrantless arrest, but holding that such proceedings may be non-adversarial). Also at petitioner's first appearance, the charges against him and his rights were explained, counsel was appointed, and bail was set. See 725 ILCS §5/109-1(b)(1)–(2), (4). That same day, petitioner was transferred from the respondent officers' custody to the Will County Adult Detention Facility. First Am. Compl. ¶132 (J.A. 72).

4. On March 31, 2011, respondent Officer Gruber testified to the positive test result before a grand jury, which returned an indictment for unlawful possession of a controlled substance. J.A. 93–96; *id.* at 54–55; see 725 ILCS §5/109-3.1(b) (providing that individuals charged with felonies must receive either preliminary hearing or indictment within 30 days of arrest). Petitioner was arraigned on the indictment on April 8, 2011. Pet. App. A2.

5. On April 1, 2011—between petitioner's indictment and arraignment on the indictment—a laboratory report issued stating that the pills were not a controlled substance. J.A. 51. The prosecution *nolle prossed* the charges against petitioner on May 4, 2011,

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[4] This description relies on a state-court docket sheet that, as petitioner notes, is not part of the record, see Pet'r Br. 4–5 & n.3, but is publicly available at the Will County Circuit Court website (https://ipublic.il12th.org/SearchPrompt.php) by clicking on the "Events" tab under case number 11CF00546.

and he was released from custody the next day. J.A. 48; Pet. App. A2.

C. Procedural History

1. On April 22, 2013—more than two years after his arrest, first appearance, indictment, and arraignment—petitioner filed a *pro se* complaint against the respondent officers and City of Joliet under §1983. Petitioner asserted claims of, *inter alia*, "wrongful and malicious" arrest and false imprisonment. J.A. 30, 35–37. He also alleged "malicious prosecution"—that one of the respondent officers "executed an erroneous and false complaint"; that "[a]s a result of this false complaint a return of an indictment was file[d] upon the plaintiff * * * without probable cause"; and that respondents "could have during the duration of plaintiff's false imprisonment, ascertained that plaintiff was being falsely imprisoned had [they] exercised reasonable diligence in performing [their] duties and not repeatedly refused to make reasonable and necessary factual investigation of the charges made against the plaintiff." J.A. 37–38.

2. The district court appointed counsel, who filed an amended complaint. J.A. 2–3, 58. This complaint similarly alleged, *inter alia*, that respondents arrested him without probable cause and engaged in malicious prosecution by "submitting false charges as contained in the criminal complaint and indictment" and "fail[ing] to take any steps to cause [petitioner] to be released from police custody" "due to the lack of probable cause supporting his arrest and continued detention." First

Am. Compl. ¶¶153, 156, 165, 173, 175, 179, 199–201 (J.A. 74–75, 77, 79–80, 83–84).[5]

3. Respondents moved to dismiss on statute-of-limitations grounds, arguing that Illinois's two-year limit for personal-injury torts barred petitioner's claims. Mem. of Law in Support of Mot. to Dismiss at 3, No. 1:13-cv-03022 (N.D. Ill. Dec. 4, 2013), ECF No. 30-1 (J.A. 6). Petitioner responded that, notwithstanding the two-year time bar, he "should have an actionable Section 1983 claim for malicious prosecution through the Fourth Amendment" because "[a] malicious prosecution claim does not accrue until the underlying proceedings terminate in favor of the plaintiff," making his claim timely. Pl.'s Modified Resp. in Opp'n to Defs.' 12(b)(6) Mot. to Dismiss at 4, No. 1:13-cv-03022 (N.D. Ill. Feb. 7, 2014), ECF No. 41 (J.A. 9).

The district court granted respondents' motions to dismiss. J.A. 10 (ECF No. 44); J.A. 97–99. The court dismissed all of petitioner's claims as time-barred, except his Fourth Amendment malicious prosecution claim, which would survive if it had a favorable-termination element, as petitioner alleged. J.A. 98. With respect to that claim, the court held that a "malicious prosecution" claim, as petitioner defined it, may not be brought under the Fourth Amendment, but instead arises under the Due Process Clause only if

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[5] Although petitioner alleged that respondents violated his due process rights by "submitting false charges as contained in the criminal complaint and indictment" and "falsely imprisoning [him] beyond a preliminary hearing," First Am. Compl. ¶165 (J.A. 77), petitioner did not press his due process claim in the district court or the Seventh Circuit and does not pursue it here. See J.A. 98; Pet i.

state law provides no adequate remedy. *Id.*; see *Newsome*, 256 F.3d at 750–52. Because Illinois law provides an adequate malicious prosecution remedy, the court dismissed the complaint. J.A. 99.

4. Petitioner appealed only the dismissal of his Fourth Amendment "malicious prosecution" claim, once again insisting that this claim was timely because "a malicious prosecution claim does not accrue until the underlying proceedings terminate in favor of the plaintiff." Br. of Pl.-Appellant, Elijah Manuel at 17, No. 14-1581 (7th Cir. June 27, 2014), ECF No. 16 (J.A. 21). Respondents countered that the Seventh Circuit should not abandon its case law, and that any §1983 claim is time-barred under Illinois's two-year limitations period. Br. of Defs.-Appellees at 5–9, No. 14-1581 (7th Cir. Aug. 18, 2014), ECF No. 25 (J.A. 22). In reply, petitioner again emphasized that "if [his] Amended Complaint is to survive a motion to dismiss, [he] must turn to the Fourth Amendment as a means to bring a Section 1983 malicious prosecution claim," which "does not accrue until the proceedings terminate in favor of the plaintiff." Reply Br. of Pl.-Appellant, Elijah Manuel at 3, 9, No. 14-1581 (7th Cir. Sept. 2, 2014), ECF No. 27 (J.A. 23).

The Seventh Circuit affirmed. J.A. 100–05. The court explained that "if Manuel has a Fourth Amendment claim * * * it would have stemmed from his arrest on March 18, 2011, which he would have had to challenge within two years, * * * but he did not sue until April 10, 2013." J.A. 103. The court further indicated that under its precedent, following arraignment, any "malicious prosecution" claim is governed by the Due Process Clause, and that claim is available only if—unlike in Illinois—state law fails to

provide a similar cause of action. J.A. 102–03 (discussing *Newsome*, 256 F.3d at 750–52). The court explained that, while *Newsome* did not preclude Fourth Amendment claims "generally" (citing, *inter alia*, *McCullach v. Gadert*, 344 F.3d 655 (7th Cir. 2003), which "recogniz[ed] a Fourth Amendment wrongful-arrest claim against an officer who allegedly gave false information in an incident report and at a preliminary hearing"), "any Fourth Amendment claim that petitioner might bring is time-barred." J.A. 103.

5. Petitioner sought certiorari review on the question of "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." Pet. i. Petitioner argued that the question was one of "national importance" because, unlike claims for false arrest, "malicious prosecution claims purvey a forgiving statute of limitations as the claims do not accrue until the charges terminate in the plaintiff's favor." Pet. 21 (internal quotation marks omitted); see also Pet. 25. And petitioner assured the Court that his case presented this issue squarely, for he needs malicious prosecution's common-law favorable-termination element for his claim to survive: "In the present case, the availability of a malicious prosecution claim and its statute of limitations will determine Manuel's fate." Pet. 21.

Respondents opposed certiorari, again arguing that any §1983 malicious prosecution claim would be time-barred. Br. in Opp. 4–5. In reply, petitioner reaffirmed his reliance on the favorable-termination element of common-law malicious prosecution. Pet. Reply 1–2.

6. This Court granted Manuel's petition on January 15, 2016.

SUMMARY OF THE ARGUMENT

1. The Court should affirm the judgment below because the Fourth Amendment is incompatible with the common-law elements of malicious prosecution. That includes the favorable-termination element petitioner admittedly needs to render his claim timely. Indeed, requiring plaintiffs claiming an unlawful seizure to succeed on the merits of the underlying prosecution would make little sense, for the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures. Importing a successful-outcome element into the Fourth Amendment (or expanding *Heck* to read this element into §1983 in this context) would withhold a Fourth Amendment remedy from victims of wrongful seizures who later are legitimately convicted.

2. Without a timely challenge to his initial arrest and probable cause finding, petitioner could put an end to his ongoing detention only by attacking the prosecution for which he was detained. That is not a Fourth Amendment issue. Due process alone governs claims, like petitioner's, alleging perversion of the procedures designed to determine whether the prosecution should continue and whether the defendant must remain detained during it.

ARGUMENT

I. Any Fourth Amendment Claim Petitioner Had Is Time-Barred, And He Cannot Overcome That Bar By Labeling His Claim "Malicious Prosecution."

It is common ground that if petitioner's allegations are true, he could have brought a Fourth Amendment claim based on his allegedly unlawful arrest (a Fourth Amendment "seizure"), which occurred on March 18, 2011. As the Seventh Circuit recognized, however, petitioner waited more than two years to file his complaint. J.A. 103. In fact, the only affirmative act that allegedly took place after March 18, 2011 was Officer Gruber's March 31, 2011 testimony before the grand jury. But that testimony, too, occurred more than two years before petitioner filed his suit, see J.A. 93–96, and as the United States recognizes, Officer Gruber is immunized for that testimony in any event. See Br. for the United States as Amicus Curiae Supporting Petitioner at 30 ("U.S. Br."); *Rehberg*, 132 S. Ct. 1497. Thus, as petitioner concedes, his Fourth Amendment claim is timely only if it benefits from a special rule delaying accrual. See Pet. 21, 25.

Petitioner's need for delayed accrual is why he asked this Court to recognize a Fourth Amendment claim of "malicious prosecution." Most courts of appeals to recognize such a claim have done so only by incorporating the common-law elements of malicious prosecution into §1983 wholesale, including the favorable-termination element. See *supra* p. 8. Accordingly, petitioner asks not merely whether *some* Fourth Amendment right "continues beyond legal process," Pet'r Br. i, but whether it does so "to allow a

malicious prosecution claim based upon the Fourth Amendment." *Id.* (emphasis added); see also Pet. 21 (conceding that petitioner needs malicious prosecution's favorable accrual rule for his claim to be timely); Pet'r Br. 35 (citing the "rich history" of malicious prosecution "at common law").

That is a question the *Albright* plurality never answered, for it did not purport to address the existence of a constitutional claim for malicious prosecution, much less its elements. *Albright*, 510 U.S. at 270 n.4; Nahmod, *supra*, §3.66; see *supra* p. 6. The Seventh Circuit's resolution of this question is correct: There is no Fourth Amendment claim with the common-law elements of malicious prosecution. Nor does *Heck* append a favorable-termination element via §1983 where, as here, petitioner does not challenge a conviction or sentence.

In straining to avoid the consequences of his own delay, petitioner would deprive others of the Fourth Amendment protections he seeks. Many people may be detained without probable cause based on an improperly-issued warrant or erroneous *Gerstein* finding in violation of the Fourth Amendment, only to be convicted constitutionally after prosecutors gather more evidence. Petitioner's favorable-termination rule would strip these people of their right to recover under §1983, no matter how patently unlawful the defendants' alleged conduct. And his rule would do so without any justification: The Fourth Amendment is concerned with searches and seizures, not prosecutions. So petitioner gets it backwards when he asserts that "[a]llowing Fourth Amendment malicious prosecution claims to be brought under Section 1983 serves * * * that statute's time-honored goals." Pet'r Br. 33. In fact, reading

malicious prosecution into the Fourth Amendment would subvert both §1983 and the Fourth Amendment.

A. Petitioner Cannot Rely On The Elements Of Common-Law Malicious Prosecution To Delay Accrual Of A Fourth Amendment Claim.

Petitioner and courts on his side of the circuit split attempt to delay accrual by incorporating into a Fourth Amendment claim the elements of common-law malicious prosecution. See *supra* p. 8. So long as the cause of action is called "malicious prosecution," the theory seems to run, it automatically embraces these elements. See Pet'r Br. 35 ("The tort of malicious prosecution has a rich history at common law * * * * [s]o permitting such suits under Section 1983 breaks no new ground.").

But malicious prosecution's elements do not fit a Fourth Amendment claim. These elements are over-inclusive because favorable termination and malice, two of the four common-law elements, are irreconcilable with bedrock Fourth Amendment law. At the same time, they are under-inclusive because, as the United States acknowledges, malicious prosecution at common law "does not have seizure as an element," although it is "a necessary component of a Fourth Amendment claim." U.S. Br. 24 n.15.

In short, any Fourth Amendment "malicious prosecution" claim petitioner could bring would share little with its namesake. And without the common law's favorable-termination element, which is impossible to square with the Fourth Amendment, petitioner's claim is untimely. For that reason alone, the answer to the question presented is "no"—the

Fourth Amendment does not permit a "malicious prosecution" claim of the sort petitioner requires.

1. Malicious Prosecution's Favorable-Termination Element Does Not Apply To Petitioner's Fourth Amendment Claim.

1. The favorable-termination element makes sense in the context of a common-law malicious prosecution claim, which is concerned with the legitimacy of the *prosecution* itself. But it has no place under the Fourth Amendment, which protects against "unreasonable searches and seizures" and "warrants" issued without "probable cause." U.S. Const. amend. IV. The Amendment says nothing about the standards for initiating or maintaining a prosecution, and it is agnostic as to how that prosecution ends.

As the Court explained in *United States v. Leon*, "[t]he wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself." 468 U.S. 897, 906 (1984) (internal quotation marks omitted). That the individual is subsequently prosecuted, and possibly convicted, "'work[s] no new Fourth Amendment wrong.'" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

Gerstein thus made clear that the Fourth Amendment does not "entitle[] [the accused] to judicial oversight or review of the decision to prosecute." 420 U.S. at 119; U.S. Br. 8 ("The Fourth Amendment does not govern the decision to pursue criminal charges."); see U.S. Br. 12. *Albright* likewise made this plain, for both the plurality and Justices Kennedy and Thomas agreed that the Fourth Amendment provides no standard for reviewing the initiation of a prosecution.

See *Albright*, 510 U.S. at 274 (plurality op.); *id.* at 282–83 (Kennedy, J., concurring).

The Fourth Amendment's history teaches the same lesson. The Amendment was "originally understood [as] focused on restraining police action before the invocation of judicial processes." *Cordova*, 816 F.3d at 662 (Gorsuch, J., concurring in the judgment). It aimed to safeguard the same interests long protected by common-law trespass torts such as residence trespasses and false imprisonment. See, *e.g.*, William J. Cuddihy, *The Fourth Amendment: Origins & Original Meaning 602-1791*, 440–45 (2009); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 576–77, 588–89 (1999).

Just as the Fourth Amendment does not govern the decision to prosecute, a Fourth Amendment claim does not depend on the prosecution's outcome. On the one hand, an "illegal arrest or detention does not void a subsequent conviction." *Gerstein*, 420 U.S. at 119. And on the other, an arrestee who later is properly *convicted* may recover under §1983 for earlier Fourth Amendment violations. The Court in *Haring v. Prosise* thus held that a prisoner's guilty plea to possessing items found in a search did not bar his action to recover on the theory that the search was unlawful. 462 U.S. 306 (1983). The conviction was "simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under §1983." *Id.* at 316. This is because, as the Court recognized, a Fourth Amendment violation becomes no less unlawful if the defendant is later convicted.

Malicious prosecution's favorable-termination element thus is impossible to square with the Fourth Amendment.

2. While petitioner and several courts of appeals rely directly on common-law malicious prosecution to delay accrual of a Fourth Amendment claim, see *supra* p. 8, the United States instead invokes *Heck* in advocating for that result, see U.S. Br. 24–25 n.16. But *Heck* does not apply to Fourth Amendment claims that do not challenge any existing conviction or sentence.

In *Heck*, the Court analogized to the common law of malicious prosecution to hold that where a criminal defendant's successful §1983 suit would "*necessarily* imply the invalidity of" an existing "conviction or sentence * * *, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487 (emphasis added). The Court took care to limit this rule to instances where §1983 plaintiffs challenged a conviction or sentence: "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed" or otherwise set aside. *Id.* at 486–87.

The Court, however, instructed that this favorable-termination requirement generally would *not* apply to Fourth Amendment claims: "[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction." *Id.* at 487

n.7. The favorable-termination requirement does not apply to such claims because, "even if successful, [they] would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.*

In *Wallace*, the Court turned that caveat into a square holding. The petitioner argued, like the United States here, that *Heck*'s "favorable termination" requirement delayed accrual of his Fourth Amendment unlawful-arrest claim under §1983 "until the State dropped its charges." *Wallace*, 549 U.S. at 392. The Court rejected that argument. It reaffirmed that *Heck* applies only in the face of "an 'outstanding criminal judgment'" or "*an extant conviction*," and does not apply to claims that an "initial Fourth Amendment violation set the wheels in motion" for a subsequent detention or conviction that has yet to occur. *Id.* at 393, 391. That is because, again, the success of the Fourth Amendment claim does not turn on the termination of those proceedings, favorable or otherwise. See *id.*

Accordingly, while the United States asserts in a footnote that *Heck* should apply to petitioner's Fourth Amendment claim for "unlawful pretrial detention pursuant to legal process," U.S. Br. 24–25 n.16, that argument contravenes both *Heck* and *Wallace*. And that cursory footnote—without which the United States' brief would not support reversal of the judgment below, for petitioner's claim would be time-barred—is virtually without reasoning. The government explains why a favorable-termination requirement makes sense for a garden-variety "malicious prosecution" claim, *id.*, but it says nothing about the only question that matters here: Why that requirement is appropriate for a Fourth Amendment claim that, by definition, is concerned not with the

result of a criminal proceeding, but with whether the initial search or seizure was supported by probable cause.

3. Moreover, appending a favorable-termination element or expanding *Heck*'s rule beyond its stated limits would *under-serve* the Fourth Amendment's protections—available to guilty and innocent alike, see *Haring*, 462 U.S. at 316—against unlawful searches and seizures. If, as petitioner and his amici contend, a Fourth Amendment claim exists based on an improper warrant or *Gerstein* finding only when the civil plaintiff can show a favorable termination of the criminal proceedings against him, the Fourth Amendment would exclude from its protections individuals seized without probable cause but ultimately tried and convicted based on other, constitutionally acquired evidence. See Br. of Albert W. Alschuler as Amicus Curiae in Support of Petitioner 35–37 ("Alschuler Br."). This would permit officers to arrest and detain without probable cause in the hopes of later gathering evidence justifying a prosecution and, ultimately, a guilty plea or conviction.

That is not how the Fourth Amendment or §1983 should work. From both a deterrence and a remedial perspective, individuals seized without probable cause should be able to recover for Fourth Amendment violations, regardless of whether they are ultimately convicted of a crime, so long as they bring their claims in a timely manner. Cf. *Leon*, 468 U.S. at 906–08 (explaining deterrence-based policy behind exclusionary rule). This is far more consistent with §1983's "'basic purpose' * * * 'to compensate persons for injuries caused by the deprivation of rights,'" Pet'r Br. 33 (quoting *Carey*, 435 U.S. at 254–55), than a rule

denying compensation to an entire class of Fourth Amendment claimants in exchange for the delayed-accrual rule this petitioner needs to save his late-filed claim.

2. Fourth Amendment Principles Are Impossible To Square With Other Elements Of Common-Law Malicious Prosecution.

Malicious prosecution does not fit the Fourth Amendment for other reasons, too. That matters because, again, many courts recognizing a malicious prosecution claim under the Fourth Amendment adopt a favorable-termination element only as part of the *wholesale* incorporation of the common-law tort, as petitioner appears to advocate. See *supra* p. 8. But that approach badly mangles constitutional principle. The key common-law element of "malice" has no Fourth Amendment basis, and conversely, the Fourth Amendment's seizure requirement has no place in common-law malicious prosecution. For this reason, too, the strange creature petitioner conjures to render his claim timely—"Fourth Amendment malicious prosecution"—does not exist.

1. At common law, malice (as the tort's name suggests) was an "indispensable" and "foundation[al]" element of a malicious prosecution claim, and it remains so today. See, *e.g.*, Martin L. Newell, *A Treatise on the Law of Malicious False Imprisonment & the Abuse of Legal Process as Administered in the Courts of the United States of America* 7 (1892) (citing state cases); *Restatement (Second) of Torts* §668. The element dates back to at least the late thirteenth century, when the writ of conspiracy emerged to address the problem of

individuals encouraging one another to falsely and "maliciously" "indict" a victim. See Note, *Groundless Litigation & the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1224–25 & nn.52–53 (1979). Malice developed as a central component of malicious prosecution because this element, by requiring a subjective inquiry and improper intent, ensures that tort liability will not deter legitimate law enforcement activity. See, *e.g.*, *Glenn v. Lawrence*, 117 N.E. 757, 759 (Ill. 1917); *Sherburne v. Rodman*, 8 N.W. 414, 414-15 (Wis. 1881); *Bruington v. Wingate*, 7 N.W. 478, 479 (Iowa 1880).

2. Yet as petitioner's own amici concede, a "subjective inquiry into malice * * * is foreign to Fourth Amendment analysis." Br. for the Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner 22. That is because the question under the Fourth Amendment is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *E.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989) (citing *Scott v. United States*, 436 U.S. 128, 137–39 (1978), and *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Kentucky v. King*, 563 U.S. 452, 464 (2011). "[T]he Fourth Amendment regulates conduct rather than thoughts," making an individual officer's subjective intent irrelevant. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 736 (2011).

Indeed, this Court has rejected use of "malice," specifically, in Fourth Amendment cases. See *Graham*, 490 U.S. at 399. As the Court explained, using a "'malicious and sadistic'" standard would "put[] in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on

whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.* at 397 (citation omitted); see also *id.* at 399 ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and *subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry.*" (emphasis added)).

3. Perhaps recognizing the inconsistency between malice and the Fourth Amendment, petitioner ignores this element. Meanwhile, the United States contends that "[t]he intent required for a Section 1983 Fourth Amendment claim of unlawful pretrial detention is *not* directly akin to the common-law element of 'malice.'" U.S. Br. 25–26 n.17 (emphasis added). Instead, on this view, a plaintiff must "establish that the defendant officers acted with intent to deceive or with reckless disregard of the absence of probable cause." *Id.* at 25.

But this argument not only abandons the common law; it also runs afoul of the Fourth Amendment. The Fourth Amendment search-or-seizure inquiry is objective, while the government's "intent to deceive" and "reckless disregard" standard is not. Nor does *Franks v. Delaware*, 438 U.S. 154 (1978), support the government's position. See U.S. Br. 27. *Franks* held that, to obtain a hearing, a criminal defendant moving to suppress evidence seized pursuant to a warrant must show that the supporting affidavit contained deliberate or reckless falsehoods essential to the finding of probable cause. *Id.* at 171–72. But that standard arises "from [the] language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise." *United States v. Calderon*, 348 U.S. 160, 164 (1954). *Franks* says nothing about the Search and Seizure Clause, which emphasizes "reasonableness" and forecloses a subjective inquiry. See, *e.g.*, *Scott v.*

United States, 436 U.S. 128, 137 (1978) (discussing *Terry*, 392 U.S. at 21–22).

4. Moreover, a common-law malicious prosecution claim does not require the plaintiff to suffer a seizure within the meaning of the Fourth Amendment. See U.S. Br. 24 n.15. Indeed, unlike a claim for false arrest or false imprisonment, malicious prosecution does not care whether the plaintiff was seized.

At common law, "the appropriate form of action for imposing a confinement was trespass for false imprisonment," *Restatement (Second) of Torts* §35 cmt. a, and the damages were (and are) "those that flow[ed] from the detention" itself. 32 Am. Jur. 2d *False Imprisonment* §135 (2007). By contrast, "[m]alicious prosecution [was] frequently classified with slander and libel as an injury to the reputation"; its concern with detention was secondary at best. *Minneapolis Threshing-Mach. Co. v. Regier*, 70 N.W. 934, 936 (Neb. 1897); see, *e.g.*, *Stancliff v. Palmeter*, 18 Ind. 321, 324–25 (1862); see also *Restatement (Second) of Torts* §670. If the plaintiff happens to have been arrested or imprisoned during the course of proceedings, he also may seek "[s]pecial [d]amages" for his resulting injuries. *Restatement (Second) of Torts* §671. Detention is thus one potential byproduct of malicious prosecution, but not one that is central, much less necessary, to the tort itself. See, *e.g.*, Newell, *supra*, at 16; Herbert Stephen, *The Law Relating to Actions for Malicious Prosecution* 117 (1889).

In short, malicious prosecution's elements do not fit with a Fourth Amendment claim, which concerns search or seizure, not prosecution and conviction, and which is unconcerned with a defendant's subjective

mental state. Petitioner thus cannot achieve the delayed accrual he needs by incorporating the common-law elements into a Fourth Amendment claim under §1983.

B. Petitioner Has Not Relied And Cannot Rely On A Continuing-Violation Theory.

1. Nor can petitioner save his untimely claim by contending that a seizure constitutes a continuing Fourth Amendment violation that delays his claim's accrual—an argument that petitioner not only failed to make earlier, but would be contrary to his prior representations to this Court.[6]

To be sure, some members of the Court have suggested that a Fourth Amendment malicious prosecution claim might accrue years after the alleged unlawful search or seizure because the defendant-turned-plaintiff remains "seized" for Fourth Amendment purposes so long as the prosecution against him is pending. *Albright*, 510 U.S. at 277–79 (Ginsburg, J., concurring); *id.* at 307 (Stevens, J., dissenting). This Court's holdings, however, are to the contrary. When a plaintiff claims to have suffered from a discrete wrong, the time of that wrong governs accrual, even when "the *effects*" of that wrong continue and "bec[o]me most painful" thereafter. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). Indeed, even if a defendant has "give[n] present effect to the

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[6] Again, petitioner insisted that the presence *vel non* of the favorable-termination element will "determine [his] fate." Pet. 21. Accordingly, petitioner has forfeited, if not outright waived, this argument. See, *e.g.*, *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

past illegal act and therefore perpetuate[d] the consequences," the date of the original wrong still defines the claim's accrual. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977).

Those teachings control here. The "seizure" of a warrantless arrest "is a single act, and not a continuous fact." *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (quoting *Thompson v. Whitman*, 85 (18 Wall.) 457, 471 (1874)); see, *e.g.*, *Leon*, 468 U.S. at 906 ("The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself.") (citation omitted). The seizure is fully accomplished no later than when the *Gerstein* hearing blesses it. The Court followed this principle in *Wallace*, rejecting plaintiff's claim that his "false imprisonment ended upon his release from custody" and holding instead that his claim accrued when he "appeared before the examining magistrate and was bound over for trial." 549 U.S. at 390, 391; see *infra* Section II.C.

Indeed, even petitioner appears to recognize that his "'detention[] * * * pending trial'" was merely a "consequence[]" of the earlier alleged wrong. Pet'r Br. 14, 24 (quoting *Gerstein*, 420 U.S. at 125 n.27) (some quotation marks omitted). But the continuing effects of that initial seizure—like the continuing effects of other statutory and constitutional violations—do not delay accrual.

2. The circumstances in which this Court has recognized a continuing-violation theory prove the point. The theory applies when the plaintiff's claim does *not* consist of "discrete acts," but rather alleged wrongs that by "[t]heir very nature involve[ ] repeated conduct" that becomes unlawful *only* via its ongoing

character—as, for example, in a challenge to a hostile work environment or racial steering in housing. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002); see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982). And while such claims are timely so long as "an act contributing to the claim occurs within the filing period," *Morgan*, 536 U.S. at 117, those claims still require "affirmative acts of the defendants" in the limitations period, *Cowell v. Palmer Twp.*, 263 F.3d 286, 293 (3d Cir. 2001) (citing *Ricks*, 449 U.S. at 258). But petitioner's claim concerns a discrete seizure, and he has not alleged *any* affirmative acts by respondents that occurred less than two years before he filed his complaint.

In light of these settled principles, lower courts repeatedly have rejected the argument that ongoing detention following a seizure works a "continuing violation" that defers the start of the limitations period until the detention ends. *MacNamara v. Hess*, 67 F. App'x 139, 143 (3d Cir. 2003); see, *e.g.*, *Batiste v. City of Boston*, 23 F.3d 394, 1994 WL 164568, at *2 (1st Cir. 1994) (unpublished table decision) (per curiam, joined by Breyer, J.); *McCune v. City of Grand Rapids*, 842 F.2d 903, 905–06 (6th Cir. 1988); *Becker v. Kroll*, 494 F.3d 904, 915–16 (10th Cir. 2007). As these courts explain, "[d]ecades of Fourth Amendment precedent [from this Court] ha[s] focused on the initial deprivation of liberty," "reflect[ing] [that] the Fourth Amendment's core concerns" are with the "'initial decision to detain an accused,'" not the period of detention (or prosecution) that may follow. *Riley v. Dorton*, 115 F.3d 1159, 1162–63 (4th Cir. 1997) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979)), *abrogated*

on other grounds by Wilkins v. Gaddy, 559 U.S. 34 (2010).[7]

Accordingly, lower courts that permit delayed accrual of §1983 claims under the Fourth Amendment do so not by adopting the continuing-violation theory, but by incorporating malicious prosecution's favorable-termination element, or by relying on *Heck*. See *supra* p. 8. Similarly, the United States and petitioner's other amici seek to achieve delayed accrual in these other ways, implicitly rejecting a continuing-violation theory.

3. Finally, the continuing-violation theory (like adoption of malicious prosecution's favorable-termination element, or an unwarranted expansion of *Heck*) runs contrary to the very purpose of a statute of limitations. Such statutes, and §1983's incorporation of them, recognize that "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred." *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487, 492 (1980) (§1983 suit barred by New York statute of limitations); see, *e.g.*, *Wallace*, 549 U.S. at 396 ("'States and municipalities have a strong interest in timely notice of alleged misconduct by their agents.'") (citation omitted).

If a Fourth Amendment malicious prosecution claim does not accrue until after the case terminates

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[7] These courts further recognize that a continuing-violation theory under the Fourth Amendment runs afoul of this Court's own treatment of conditions-of-confinement cases, which are governed by the Due Process Clause or the Eighth Amendment, not the Fourth Amendment. See *Becker*, 494 F.3d at 915–16.

against the plaintiff (whether favorably or unfavorably), law enforcement officers would find themselves defending against such claims years or even decades after the allegedly unlawful search or seizure, often only after the §1983 plaintiff completes a period of incarceration following conviction. Such defenses, even against baseless claims, would become difficult if not impossible as "[w]itnesses die or move away; physical evidence is lost; [and] memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986). For this reason, too, this Court should reject a continuing-violation view of the Fourth Amendment.

C. Without A Favorable-Termination Element Or Continuing Violation, Petitioner's Claim Fails.

Thus, if petitioner had a viable §1983 Fourth Amendment claim, it accrued when he was seized, and probable cause for the seizure found, on March 18, 2011. That claim was therefore barred by Illinois's applicable two-year statute of limitations. Petitioner cannot avoid that result by incorporating common-law elements with no grounding in the Fourth Amendment. Nor can he delay the accrual of his claim by arguing (implicitly, and for the first time) that he suffered a continuing Fourth Amendment violation for the entire period of his prosecution.

In fact, petitioner never advances any express theory as to why his Fourth Amendment claim is timely. To the extent one can be discerned, it begins with the reference in *Wallace* to a "malicious prosecution" claim that arises after "institution of legal process." Pet'r Br. 7, 13. *Wallace*, petitioner says, "refer[ed] to an arrest warrant as 'legal process,'"

which petitioner takes to mean that the Fourth Amendment—which governs arrest warrants—houses the "malicious prosecution" claim described in *Wallace*. See Pet'r Br. 17–19 (citing *Malley v. Briggs*, 475 U.S. 335 (1986)). A *Gerstein* hearing, petitioner goes on, is "'the same'" for relevant purposes as an arrest warrant. Pet'r Br. 20 (quoting *Gerstein*, 420 U.S. at 120). And so, petitioner concludes, "detention by reason of a *Gerstein* hearing" is likewise detention pursuant to "legal process" and therefore supports a claim for "malicious prosecution * * * under the Fourth Amendment." Pet'r Br. 10, 21 (internal quotation marks omitted).

Putting aside the fact that *Wallace* does not hold that an arrest warrant is "legal process" as petitioner uses the term, see *infra* pp. 48-49, his argument fails because it assumes away the only question that matters. What determines petitioner's "fate" is whether there exists a "malicious prosecution" claim under the Fourth Amendment *that contains the favorable-termination element* petitioner needs. Pet. 21. But as explained above, such an element is foreign to the Fourth Amendment. And that remains true however one parses *Wallace*'s references to "malicious prosecution" and "legal process." So while arrest warrants and *Gerstein* hearings serve the same basic function in assessing probable cause for an initial arrest, that only reinforces why a favorable-termination element does not apply to alleged misstatements at *either* stage.

In short, *Wallace*'s bare mention of the term "malicious prosecution" is too thin a reed to carry the weight of a favorable-termination element that cannot be squared with the Fourth Amendment. See *Wallace*, 549 U.S. at 390 n.2 ("We have never explored the

contours of a Fourth Amendment malicious-prosecution suit under §1983, * * * and we do not do so here."). Without that element, it is immaterial whether *Wallace* would label petitioner's claim as one for false arrest or malicious prosecution. Either way, the claim is untimely.

II. After The Prosecution Begins, The Due Process Clause, Not The Fourth Amendment, Governs Petitioner's Claim That His Detention Was Unduly Prolonged.

As Part I shows, the Fourth Amendment does not house a constitutional tort with the favorable-termination element that would delay accrual of petitioner's otherwise untimely claim. This Court's inquiry may end there. The answer to the question presented is "no": There is no "malicious prosecution claim," as petitioner must define the term, "based upon the Fourth Amendment." Pet. i. Accordingly, even if petitioner were correct that officer misstatements violate the Fourth Amendment whenever they cause a person to be detained—whether those misstatements occur at a warrant hearing, a *Gerstein* hearing, before a grand jury, at a preliminary hearing, or elsewhere—on the facts of this case petitioner's claim fails as a matter of law.

But petitioner's claim also fails because he has no Fourth Amendment claim for "continued detention" after his initial seizure and probable cause finding. First Am. Compl. ¶175 (J.A. 79). Following a *Gerstein* finding of probable cause—at least as far as the Fourth Amendment is concerned—the suspect may be detained until he is tried or the charges are dropped.

Petitioner contends that the prosecution was abusive and should have stopped (along with his detention) earlier than it did. *Id.* ¶¶153, 156, 165, 169, 173, 179, 199–201 (J.A. 74–75, 77–80, 83–84); Pet i. But if such a claim—which contests the validity of the *prosecution*—has a constitutional home anywhere, it is not the Fourth Amendment. The Due Process Clause is the only possible grounding for a claim that petitioner suffered a deprivation of liberty because respondents allegedly encouraged an abusive prosecution and frustrated the procedural safeguards meant to prevent baseless prosecutions. U.S. Const. amend. XIV.

A. There Is No Fourth Amendment Claim For Unduly Prolonged Detention Following Arrest And Commencement Of Prosecution.

1. The only requirement the Fourth Amendment prescribes for pretrial detention is an independent assessment of probable cause for the initial seizure. That may occur via an arrest-warrant proceeding before the seizure, or via a *Gerstein* finding after. *Gerstein*, 420 U.S. at 118, 124–25. Either way, that initial assessment is all this Court has ever required, as a Fourth Amendment matter, for "the detention of suspects pending trial." *Id.* at 125 n.27; see *id.* at 111 (*Gerstein* hearing authorizes suspect to be "held for trial"); *Michigan v. Doran*, 439 U.S. 282, 295 (1978) (*Gerstein* spelled out "[t]he requirements of the Fourth Amendment" in this area).

By contrast, when the initial seizure is *not* at issue, there is no Fourth Amendment right to be released from detention before the conclusion of trial or the

dismissal of charges. See *Gerstein*, 420 U.S. at 111, 125 n.27; *Baker v. McCollan*, 443 U.S. 137, 144–45 (1979); see also *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979) (after *Gerstein* probable cause finding, "the Government may permissibly detain a person suspected of committing a crime prior to a[n] * * * adjudication of guilt" at trial (citing *Gerstein*, 420 U.S. at 111–14)). That remains true whether the initial assessment is unassailable because it was concededly lawful or because, as here, challenges to it are time-barred. *United Airlines*, 431 U.S. at 558 (act "not made the basis for a timely charge" is "treat[ed] * * * as lawful"). If a defendant (or later, a civil plaintiff) claims entitlement to an earlier release, he must seek refuge elsewhere in the "elaborate system * * * designed to safeguard the rights of those accused of criminal conduct," of which the Fourth Amendment is "only the first stage." *Gerstein*, 420 U.S. at 120–23, 125 n.27; see *infra* Section II.B.

The Court recognized this principle in *Baker v. McCollan*. There, the plaintiff alleged that after executing a valid arrest warrant, a sheriff failed to undertake "adequate identification procedures" "despite his protests of mistaken identity." 443 U.S. at 142, 144. The Court explained that because the plaintiff had not challenged the underlying warrant or arrest, he failed to state a Fourth Amendment claim. *Id.* at 143–44. Instead, when the plaintiff alleged he suffered "prolonged detention caused by" the sheriff's errors, the "constitutional provision allegedly violated" was the Due Process Clause or, potentially, "the right to a speedy trial." *Id.* at 142, 144–45.

2. Even when initially authorized by the Fourth Amendment, detention may continue only so long as a

prosecution proceeds. Arrest alone does not authorize indefinite detention, so unless the decision is made to prosecute (and continue that prosecution), the defendant must be released. See *Baker*, 443 U.S. at 144–45. Accordingly, at some juncture following an initial seizure, a criminal defendant's continued pretrial detention is due to the prosecution, rather than the initial arrest and probable-cause finding. See generally *Hartman*, 547 U.S. at 262–63; *Graham*, 490 U.S. at 395 n.10. That is why petitioner must concede that his theory is more accurately described as "unreasonable *prosecutorial* seizure." Pet'r Br. 13 (internal quotation marks omitted) (emphasis added). The defendant remains detained only because the prosecution continues.

But the question of whether the prosecution continues—or instead should cease, causing the defendant's release—does not concern the Fourth Amendment. This Court long has made clear that the Fourth Amendment does not grant a criminal defendant a right "to judicial oversight or review of the decision to prosecute." *Gerstein*, 420 U.S. at 119; see *Costello v. United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, * * * is enough to call for trial."); *Albright*, 510 U.S. at 282 (Kennedy, J., concurring in the judgment) (similar).

All of this shows why petitioner has no viable Fourth Amendment claim for detention resulting from "malicious prosecution" beyond "legal process." Pet. i. The initial arrest and probable-cause assessment, though he contends they were flawed, are not subject to challenge here because the limitations period has

expired. See *supra* Part I. With that initial assessment removed from consideration, the Fourth Amendment does not confer a right to release prior to trial or the dismissal of charges. And while petitioner claims that respondents procured and prolonged that prosecution abusively, see *supra* p. 36, the Fourth Amendment does not govern the prosecution's propriety. So petitioner's remedy, if any, lies elsewhere. See, *e.g.*, *Llovet*, 761 F.3d at 762 ("The [Fourth] [A]mendment does not regulate the length of detentions after a judge or magistrate has determined that there is probable cause to detain a person on a criminal charge.").

3. Again, petitioner builds his case on *Gerstein*, contending that "the Fourth Amendment supplies the basis for analyzing allegedly unconstitutional 'detentions of suspects pending trial.'" Pet'r Br. 14 (quoting *Gerstein*, 420 U.S. at 125 n.27). Petitioner reasons that he must have stated a Fourth Amendment violation with his claim that the "criminal proceedings against him * * * result[ed] in his prolonged detention." Pet'r Br. 13. But *Gerstein* did not hold that a potential Fourth Amendment claim arises from every instance of prolonged pretrial detention. *Gerstein* mandated a finding to justify "the *initial decision* to detain an accused" following a warrantless arrest, *Bell*, 441 U.S. at 533–34 (emphasis added), but also established that the Fourth Amendment did not require anything *else* to authorize "detention of suspects pending trial," *Gerstein*, 420 U.S. at 125 n.27; see *supra* p. 36. In fact, *Baker* recognized that a similar "prolonged detention" claim did not arise under the Fourth Amendment. 443 U.S. at 142, 144–45.

Indeed, petitioner's theory proves far too much. While he tries to cabin his claim to prolonged *pretrial* detention, he betrays the logic of his position when he says that anyone who is ever "put in jail is seized from arrest until release." Pet'r Br. 22. Under that rule, as petitioner's amici make explicit, even *post*-conviction detention would violate the Fourth Amendment if there were an objective lack of probable cause at the time of arrest, see, *e.g.*, Alschuler Br. 4, 6–7—for if a grand jury indictment or decision to bind the defendant over following a preliminary hearing do not mark the end of any initial Fourth Amendment seizure, there is no reason why conviction following trial would do so. This would mean that, contrary to settled law, the Fourth Amendment forbids all trial-related misconduct causing or perpetuating the detention of a criminal defendant whom there is no probable cause to detain. The state's failure to disclose exculpatory evidence, a prosecutor's decision to press charges based on retaliatory animus, and the state's suborning perjury all would become Fourth Amendment claims, whereas until now the Court has treated them exclusively as matters of due process. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963); *United States v. Bagley*, 473 U.S. 667, 680 (1985); *United States v. Goodwin*, 457 U.S. 368, 372–73 (1982); *United States v. Augenblick*, 393 U.S. 348, 352–53 (1969). Petitioner fails to address this established law, much less offer any sound basis for upending it.

B. The Due Process Clause Is The Sole Constitutional Home, If One Exists, For Petitioner's Claim.

1. With his initial detention and probable cause finding time-barred, petitioner's claim here is, at

bottom, a challenge to the allegedly abusive prosecution that led to his "prolonged detention." Pet'r Br. 13. His confinement continued because, and only because, respondents allegedly procured "criminal proceedings against him" and avoided the dismissal of those proceedings until May 4, 2011. See *supra* pp. 11-12.

Procedures exist for halting allegedly abusive prosecutions. For instance, a grand jury may refuse to indict, or the court may dismiss charges after a preliminary hearing. See Yale Kamisar *et al.*, *Modern Criminal Procedure* 963, 1013 (13th ed. 2012) (grand juries and preliminary hearings provide "screening of the prosecutor's decision to file felony charges"). A claim, like petitioner's, that a prosecution should have ceased earlier thus alleges *either* that the respondents abused these procedures *or* that additional procedures should have been provided that would have led to the prosecution's termination (and thus the suspect's release).

2. Such claims are quintessential due process issues. Demands for additional procedural safeguards are at the core of due process. *Baker*, 443 U.S. at 145; see *Gerstein*, 420 U.S. at 125 n.27; see also *United States v. Salerno*, 481 U.S. 739, 746, 750 (1987) (procedures for pre-trial bail); *Wolff v. McDonnell*, 418 U.S. 539, 558–59 (1974) (post-conviction discipline); *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972) (public employment).

Likewise, this Court has long recognized that a state violates due process when it turns existing procedures into "a contrivance" "through a deliberate deception" via "the presentation of testimony known to

be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The same is true of all manner of malicious abuses of the state's criminal procedures that effect a deprivation of liberty—including, of particular relevance here, when the state's agents commence or continue criminal proceedings out of "an improper vindictive motive," *Goodwin*, 457 U.S. at 373, 384; see *N. Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (same in sentencing proceedings), or when "bad faith" by police officers results in the destruction of exculpatory evidence, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

In fact, Justice Scalia indicated that one of petitioner's very allegations—the "supposed knowing use of fabricated evidence before the grand jury"—would "state a claim for denial of due process." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) (emphasis omitted) (citing *Mooney*, 294 U.S. at 112); First. Am. Compl. ¶165 & Ex. 2 (J.A. 77, 94–96); Pet. App. A2. Lower courts, too, have recognized that due process governs abusive deprivations of liberty or property stemming from the commencement of prosecution[8]—precisely what petitioner alleges here. Br. of Pl.-Appellant, *supra*, at 3, 5 (ECF No. 16); J.A. 37–38, 62–63, 77.

3. Petitioner could have invoked these principles to challenge the prosecution that resulted in his prolonged detention. But he did not press such a claim, and he

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[8] See, *e.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 585–86 (7th Cir. 2012); *Klen v. City of Loveland*, 661 F.3d 498, 516 (10th Cir. 2011); *Surprenant v. Rivas*, 424 F.3d 5, 15 (1st Cir. 2005); *Devereaux v. Abbey*, 263 F.3d 1070, 1074–75 (9th Cir. 2001) (en banc); *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000).

cannot transform the Fourth Amendment into a vehicle to do so.

Indeed, petitioner's position is especially untenable insofar as he suggests he retained a live Fourth Amendment claim after these procedures ran their course. If a grand jury or preliminary hearing reaffirms that a prosecution should advance, then any continued detention is plainly the result of *that* proceeding, not the initial seizure. At that point, there is no further relevance to any alleged misrepresentations in connection with "the *initial decision* to detain an accused" pending trial, *Bell*, 441 U.S. at 533–34 (emphasis added), which is the Fourth Amendment's sole concern. See *supra* p. 36.[9]

4. This distinction between the Fourth Amendment and the Due Process Clause accords with lines the Court has often drawn. While a seizure on the street—*i.e.*, an arrest—is a core Fourth Amendment issue, once the prosecution begins, due process governs the adequacy of procedures for release on bail. See *Salerno*, 481 U.S. at 746, 750. Similarly, while the Fourth Amendment governs the manner of the initial detention, the manner of continued detention pending trial—the conditions of confinement, or claims of excessive force—are matters of due process. See *Bell*, 441 U.S. at 535–36. And what is true of a suspect's

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[9] The result might be different if a grand jury indictment had been used to obtain an arrest warrant, which officers then employed to procure a suspect's initial arrest. See, *e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014) (noting that grand jury "indictment triggers 'issuance of an arrest warrant without further inquiry'" (quoting *Gerstein*, 420 U.S. at 117 n.19)). Here, the grand jury hearing came long after petitioner's arrest and *Gerstein* determination. See *supra* pp. 11-12.

liberty holds equally for his property. The initial seizure's legality is a Fourth Amendment question, but when the government seeks to prolong control over assets pending trial under a forfeiture statute, due process provides the standard. *Kaley v. United States*, 134 S. Ct. 1090, 1096 (2014); cf. *id.* at 1098 (commencement of legal process via indictment "eliminates * * * Fourth Amendment" inquiry as to "probable cause to support any detention"). Likewise here, the Fourth Amendment's scope is limited to the initial probable cause assessment; it does not stretch to include the propriety of the ensuing prosecution or alleged corruption of the procedures designed to oversee it.

5. Due process is the only possible home for a constitutional tort that looks anything like common-law malicious prosecution. To be sure, it is by no means clear that a claim with the tort's common-law elements exists as a *constitutional* cause of action under §1983. After all, §1983 is not "simply a federalized amalgamation of pre-existing common-law claims." *Rehberg*, 132 S. Ct. at 1504; see Nahmod, *supra*, §3.63. But due process is the only candidate here.

At a minimum, the Fourth Amendment is incompatible with two elements that characterize the "'distinct' tort of malicious prosecution": favorable termination and malice. *Wallace*, 549 U.S. at 390 (citation omitted); see *supra* Section I.A. Not so with due process. Malicious prosecution's favorable-termination element is at least arguably consistent with a challenge to the integrity of the prosecution itself (rather than a mere challenge to the defendant's seizure). And the integrity of the processes involved in prosecution is the bailiwick of due process. See

California v. Trombetta, 467 U.S. 479, 485 (1984) (due process "ensur[es] the integrity of our criminal justice system"); see, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (due process claimant must show either effect on outcome or "structural defect" in proceeding).

Likewise, malicious prosecution's malice element is incompatible with the Fourth Amendment, see *supra* Section I.A.2, but fits easily with due process, which long has been home to intentional constitutional torts. See, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Paul v. Davis*, 424 U.S. 693, 708–09 (1976). In fact, historically the "guarantee of due process has been applied [only] to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331 (citations omitted).

Similarly, the damages available for a malicious prosecution claim make sense only as part of a due process challenge to the integrity of the prosecution—not merely a challenge to an accompanying confinement. *Wallace* explained that at common law "unlawful detention forms *part of* the damages" for malicious prosecution. 549 U.S. at 390 (emphasis added). But common-law malicious prosecution was a "dignitary tort," 2 Dan B. Dobbs, *The Law of Remedies* §7.1(1) (2d ed. 1993); see 3 William Blackstone, Commentaries *127, which compensated plaintiffs for the broad array of harms attributable to being falsely accused of a crime, including reputational harm and emotional distress, *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149–50 (K.B. 1698); *accord Restatement (Second) of Torts* §§670, 671. Such damages, to the extent

compensable under §1983, make sense only in an action challenging the integrity of a prosecution.[10]

C. The Court Need Not Determine When Petitioner Was First Held Pursuant To The Ongoing Prosecution, But His Initial Appearance Before A Magistrate Is Consistent With Nationwide Criminal Procedure And This Court's Precedent.

1. This case does not require the Court to determine the precise moment when petitioner's detention resulted from the ongoing prosecution, rather than his initial seizure. Petitioner filed his suit more than two years after his arrest, *Gerstein* finding, first appearance, indictment, and arraignment. If any of those points mark the end of a Fourth Amendment claim, that claim is untimely.

But if the Court were to specify a breakpoint—a moment at which a defendant definitively is detained not pursuant to the initial arrest, but because a prosecution has commenced and is ongoing—the obvious point would be the defendant's first appearance

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[10] This line also is consistent with *Albright*. In light of the particular allegations in that case, only Justices Kennedy and Thomas construed Albright's claim as a challenge to his prosecution, and so only these Justices—unlike the plurality and Justice Souter—treated it as a malicious prosecution claim. 510 U.S. at 281 (Kennedy, J., concurring in the judgment). The plurality, Justice Scalia, and Justice Souter likewise all recognized a distinction between a challenge to an initial seizure and a challenge to a prosecution, but because they did not understand Albright to challenge the latter, they did not even call Albright's claim "malicious prosecution." *Id.* at 271 (plurality); *id.* at 275 (Scalia, J., concurring); *id.* at 289–91 (Souter, J., concurring).

before a magistrate. This appearance, otherwise known as the "initial presentment," "preliminary arraignment," or "arraignment on the complaint," stems from the requirement that an "arrestee who is held in custody * * * must be presented before the magistrate court within a time period typically specified as either 24 or 48 hours." Kamisar, *supra*, at 13–14; see also Unif. R. Crim. P. 311(a), (d) (1987); Fed. R. Crim. P. 5(a).

"This first time before a court * * * is generally the hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,' and 'determine[s] the conditions for pretrial release.'" *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199 (2008) (quoting 1 Wayne R. LaFave *et al.*, *Criminal Procedure* §1.4(g) (3d ed. 2007)); see 3 Wayne R. LaFave *et al.*, *Criminal Procedure* §11.2(b) (4th ed. 2015); Kamisar, *supra*, at 13–14. It is also the latest point at which the constitutional right to counsel attaches, for it marks the "point at which the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Rothgery*, 554 U.S. at 198 (internal quotation marks omitted). As in this case, moreover, because it is the moment when bail is set, the first appearance marks a defendant's transition from police custody to detention at the county jail. See *supra* pp. 11-12; see generally Kamisar, *supra*, at 11, 14. At that point petitioner can no longer claim he was detained because of his initial seizure; rather, he then was detained

because the government exercised its discretion to prosecute him.

2. To the extent "malicious prosecution" in *Wallace* refers to a constitutional claim with elements of the common-law tort (by no means a given, see *supra* Section I.C), that decision suggests this very line. The Court in *Wallace* described the initiation of process as the moment when a defendant "is bound over by a magistrate or arraigned on charges," concluding that when the plaintiff "appeared before the examining magistrate" his false imprisonment claim ended and a "malicious prosecution" claim began. 549 U.S. at 389–91. Unlike a warrant hearing or *Gerstein* finding (petitioner's definition of "process," see *supra* Section I.C, *infra* Section II.D), which may occur *ex parte*, an appearance "before the examining magistrate" suggests a first appearance, as does the phrase "arraigned on charges," which mirrors a phrase—"arraignment on the complaint"—that is synonymous with "first appearance." The Seventh Circuit, too, uses the term "arraignment" or "'initial appearance in court'" to describe the transition between false arrest and malicious prosecution, see Pet'r Br. 21; *Llovet*, 761 F.3d at 763 (quoting *Hernandez v. Sheahan*, 455 F.3d 772, 776-77 (7th Cir. 2006)), as does the United States in this case, see U.S. Br. 6 n.8 (recognizing that petitioner was arraigned within Seventh Circuit's meaning when he "had his first appearance on the criminal complaint").

And while *Wallace* also used the phrase "bound over by a magistrate" to describe the transition, this term does not refer to a *Gerstein* hearing, as petitioner implies. See Pet'r Br. 17. Rather, being "bound over" refers to the magistrate's later finding, at a preliminary

hearing, that sufficient evidence exists to proceed with the prosecution or trial.[11] See, *e.g.*, *Albright*, 510 U.S. at 269 (plurality op.); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); see also Kamisar, *supra*, at 1011 (magistrate makes "bindover determination" at preliminary hearing).[12]

D. Petitioner's Counterarguments Fail.

1. Petitioner disregards all of this and contends that a *Gerstein* finding is "process" giving rise to a malicious prosecution claim under *Wallace*. See *supra* Section I.C. But the idea that *Wallace* intended to refer to a *Gerstein* finding (without ever using that term) as triggering a Fourth Amendment malicious

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[11] Nor is there anything to *Wallace*'s reference to the lack of an arrest warrant in that case. See Pet'r Br. 17. At most, this reference recognizes that process could not have commenced because there was not even a warrant. But the Court did not equate issuance of an arrest warrant with the start of legal process. Instead, *Wallace* says legal process comes later, when a defendant "is bound over by a magistrate or arraigned on charges." 549 U.S. at 389.

[12] At common law, courts may have treated a warrant hearing as the starting point of a malicious prosecution claim, see, *e.g.*, *Restatement (Second) of Torts* §654, cmt. c, but this Court need not conform to every particular of the common law, especially when constitutional principle, to say nothing of modern norms of criminal procedure, is to the contrary, *Rehberg*, 132 S. Ct. at 1503. In any event, common-law courts also recognized that malicious prosecution challenges to *ex parte* proceedings did not require the tort plaintiff to prove favorable termination, the one element petitioner must insist upon here. See, *e.g.*, *Fortman v. Rottier*, 8 Ohio St. 548, 551 (1858); *Bump v. Betts*, 19 Wend. 421, 422 (N.Y. Sup. Ct. 1838); *Steward v. Gromett*, 141 Eng. Rep. 788, 793 (Ct. Common Pleas 1859) (opinion of Erle, C.J.).

prosecution claim, *complete with a successful termination element*, is impossible to sustain.

"The sole issue [in a *Gerstein* hearing] is whether there is probable cause for detaining the arrested person *pending further proceedings*." *Gerstein*, 420 U.S. at 120 (emphasis added). As petitioner acknowledges, *Gerstein* hearings differ from criminal prosecutions because they may be non-adversarial, conducted *ex parte*, and resolved entirely on either hearsay evidence or written testimony. Pet'r Br. 20 & n.5. They also differ in that they are not held to further a criminal prosecution, but rather (like warrant hearings) to ensure prompt assessment of probable cause to arrest even while a decision whether to prosecute may remain pending. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that *Gerstein* finding ordinarily must occur within 48 hours). To be sure, in many cases—as in this one—a magistrate will make the *Gerstein* finding at the start of the defendant's first appearance. 3 LaFave, *supra*, §11.2(b). But in such cases, it is not the *Gerstein* finding but what follows—the reading of charges, description of rights, attachment of the Sixth Amendment right to counsel, and bail determination—that mark the initiation of the prosecution.

That does not challenge petitioner's assertion that the questions addressed at a post-arrest *Gerstein* hearing are "'the same' as * * * for the issuance of an arrest warrant." Pet'r Br. 20 (quoting *Gerstein*, 420 U.S. at 120). They *are* the same. They both arise under the Fourth Amendment because they both concern a suspect's initial arrest and detention. Neither recognizes a Fourth Amendment claim for "prolonged detention" following the initial assessment of probable

cause, Pet'r Br. 13; neither addresses the propriety of the prosecution whose maintenance caused that prolonged detention; and neither provides any basis for a malicious prosecution claim with a favorable-termination element—the initial arrest could have been flagrantly unlawful but an ensuing prosecution and conviction perfectly permissible.

2. Petitioner invokes *Burns v. Reed* for its observation that, for purposes of the absolute immunity doctrine as applied to prosecutors, "a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process.'" 500 U.S. 478, 492 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Yet not only did that case address the very different issue of when absolute immunity begins, but it involved a prosecutor's effort to secure a search warrant—and even petitioner does not contend that every request for a search warrant marks the start of a malicious prosecution claim.

3. Finally, petitioner errs when he claims that Justice Scalia's concurrence in *Kalina* suggested that malicious prosecution claims may "be brought against officers who cause illegal detentions pursuant to arrest warrants not supported by probable cause." Pet'r Br. 19 (citing *Kalina*, 522 U.S. at 133–34 (Scalia, J., concurring)). In fact, Justice Scalia noted only that under the common law rule, "[a] private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution." 522 U.S. at 132. Justice Scalia said nothing about whether a tort with the elements of common-law malicious prosecution would be cognizable under §1983 if a police officer procured an arrest warrant without probable cause that resulted in a criminal prosecution.

* * * *

In short, because *Wallace* recognizes a line between false imprisonment and malicious prosecution claims that falls *after* the *Gerstein* finding, petitioner is wrong to argue—as he does throughout his brief—that misstatements in support of a *Gerstein* finding support a Fourth Amendment claim for malicious prosecution. In fact, those are Fourth Amendment claims that, as *Wallace* holds, accrue when the (malicious) prosecution begins. Again, however, even if *Wallace* actually intended to announce a new "malicious prosecution" tort based on an adverse *Gerstein* finding—so that two Fourth Amendment torts with different elements (false arrest and malicious prosecution) sit back to back—the latter, process-based tort would lack the common-law element petitioner needs to prevail. See *supra* Part I.

All of this is in step with the Seventh Circuit's holding below, which does not suggest that falsehoods at a *Gerstein* hearing are not actionable misconduct under the Fourth Amendment. J.A. 103. Indeed, the parties never so much as cited *Gerstein* in their appellate briefs. That court merely recognized, consistent with its precedent, that "[r]elabeling a fourth amendment claim as a 'malicious prosecution' [does] not extend the statute of limitations." *Newsome*, 256 F.3d at 751. Because petitioner waited more than two years after his arrest and probable cause finding to file his complaint, he could not overcome the time bar by calling his Fourth Amendment claim "malicious prosecution." If petitioner wanted to challenge his ongoing detention, he needed to do so under the Due Process Clause.

E. There Are Advantages To Favoring State Law As A Source Of Malicious Prosecution Claims.

Because petitioner disavows any desire to assert a claim under the Due Process Clause, this Court need not resolve how the rule of *Parratt*, 451 U.S. 527, which applies when the conduct of a government official is random and unauthorized, would impact such a hypothetical claim. See Pet'r Br. 33 (asserting that if malicious prosecution is governed by due process, "it would not necessarily follow that *Parratt*[] * * * would apply in this setting"). But when a procedural due process tort is potentially subject to *Parratt*, it encourages robust state-law remedies. Accordingly, recognizing that a §1983 claim for malicious prosecution sounds, if at all, in the Due Process Clause would have the salutary effect of encouraging further development of state remedies for malicious prosecution.

Under *Parratt*, procedural due process does not require pre-deprivation procedures to protect a constitutional interest (here, liberty) if the deprivation results from a random and unauthorized act (here, the alleged falsification of evidence) when state law provides adequate post-deprivation process (here, a state-law malicious prosecution tort). See *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Accordingly, state actors are subject to federal claims under §1983 only when the state's remedies are inadequate. See *Julian v. Hanna*, 732 F.3d 842, 846–48 (7th Cir. 2013) (holding

that Indiana has not adopted an adequate malicious prosecution remedy).[13]

For a procedural due process tort, therefore, the States, rather than §1983, serve as the primary sources of substantive law. That means there are no "uncertainties" over what process is "due" when *Parratt* applies, Pet'r Br. 30—the process due is the process provided for by state law, so long as that law is constitutionally adequate. The Federal Constitution thus serves as a floor, rather than a ceiling, on the protection of individual rights.

Presently, state experimentation with the elements of common-law malicious prosecution occurs principally over the favorable-termination element. See generally *Cordova*, 816 F.3d at 664 (Gorsuch, J., concurring in the judgment). Some states treat this element as requiring that the termination of criminal proceedings indicates innocence. *Miles v. Paul Mook of Ridgeland, Inc.*, 113 So. 3d 580 (Miss. Ct. App. 2012). Others view it as requiring only that the criminal prosecution be dismissed, even by a *nolle prosequi*. *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 426 (D. Del. 2013). This experimentation is beneficial and permits states to account for variations in their criminal practice and procedure.

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[13] For this reason, the argument by one of petitioner's amici that §1983 malicious prosecution cannot be a procedural due process tort because "there is no limit on a state's ability to immunize its own officers" is misguided. Br. of Nat'l Police Accountability Project as Amicus Curiae in Support of Petitioner 11. As the Seventh Circuit has held, *Parratt* does not apply, and a federal remedy exists, when state law immunizes law enforcement personnel from malicious prosecution liability. *Julian*, 732 F.3d at 846–48.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

MATTHEW S. HELLMAN
ERICA L. ROSS
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK
SUPREME COURT AND
APPELLATE CLINIC AT
THE UNIVERSITY OF
CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

MICHAEL A. SCODRO
Counsel of Record
CLIFFORD W. BERLOW
BRIANA T. SPRICK-
SCHUSTER
CHRISTOPHER M. SHEEHAN
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
mscodro@jenner.com

MARTIN J. SHANAHAN, JR.
CORPORATION COUNSEL
CITY OF JOLIET
150 West Jefferson Street
Joliet, IL 60432
(815) 724-3800

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